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No. 02-8286

IN THE

Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WILLIAM G. BROADDUS, W.J. MICHAEL CODY, JOHN R. DUNNE, AND THOMAS P. SULLIVAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1/]

Each of the *amici curiae* has served for a substantial period of time in a federal or state government position responsible exclusively or in large measure for the enforcement of the criminal laws.[2/] We are not accustomed to appearing on the criminal defense side of the Bar. We join this brief, however, united in our conviction that the death penalty has been imposed in this case because of egregious failings by both the prosecution and defense counsel.

We believe that our criminal justice system depends for its fairness and effectiveness on the willingness of prosecutors to follow the fundamental rules of Due Process enunciated by this Court, and we have a strong interest in the competence of defense counsel, both because Due Process requires it and because, as a pragmatic matter, convictions in well tried cases by the prosecutor are jeopardized by defense counsel's ineffectiveness.

1/ This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk.

2/ William G. Broaddus was the Attorney General of Virginia from 1985-86. Before then he was Virginia's Chief Deputy Attorney General and had spent nine years as a county attorney. W. J. Michael Cody was the United States Attorney for the Western District of Tennessee from 1977-1981, and then served as the Attorney General of Tennessee from 1984-1988. John R. Dunn was the Assistant Attorney General for Civil Rights at the U.S. Department of Justice from 1990 to 1993. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as co-chair of the Illinois Governor's Commission on Capital Punishment.

The integrity of the prosecution and defense functions is especially important in capital cases, for obvious reasons. Moreover, today the American judicial system is subject to intense public scrutiny from around the globe. For these reasons, and because we are certain that, at least at the penalty phase of this case, the prosecution through malfeasance and the defense through indifference deprived petitioner of his constitutional rights, we have taken the unusual step of lending our voice to the petitioner in this case.

STATEMENT

1. The Prosecution's Use Of False Testimony

Prosecution witness Robert Farr, who testified against petitioner at both the guilt/innocence phase and the penalty phase of the trial, was paid $200 by Bowie County Deputy Sheriff Willie Huff to act as an informant in gathering evidence against petitioner. Fed. Ev. Hr'g Tr. at 87-89. Yet at trial he falsely denied under oath that he was a paid informant or that he had had any contact with the police during the investigation of the case. Pet. App. A at 5.

The prosecution did nothing to correct that perjurious testimony (which it knew to be false). To the contrary, in closing at the guilt/innocence stage, the prosecution praised Farr's candidness and assured the jury that "[w]e didn't hide anything with regard to any of [our] witnesses." 10R 2449, 2453.

At the penalty phase, to establish petitioner's supposed future dangerousness, the prosecution recalled Farr to the stand. He testified that he and the petitioner had driven to Dallas at petitioner's urging because petitioner planned to commit armed robberies and needed a gun to take care of any trouble that might arise, *i.e.*, to shoot people. Pet. App. A at

6. He repeated his perjurious testimony of the previous day when he again falsely denied having had prior contact with Deputy Huff and that he was cooperating with the prosecution 10R 2503-09.

Rather than correct any of Farr's lies, the prosecution in closing argument at the penalty phase again assured the jury of Farr's truthfulness, saying that he had "been open and honest with you in every way." 10R 2579. The prosecution added that Farr's testimony was "of the utmost significance" to their case for the death penalty because it showed that Banks posed a "danger to friends and strangers, alike." Pet. App. C at 44; 10R 2593. Farr was one of only two witnesses called by the prosecution at the penalty phase, and the Fifth Circuit in its decision below acknowledged that Farr's testimony "was crucial to the State's position on future dangerousness." Pet. App. A at 32.

The prosecution's tolerance of Farr's perjured testimony, and its own false statements to the jury endorsing that testimony, was part of a pattern of misconduct. Prosecution witness Cook, the key prosecution witness at the guilt/innocence phase of the trial, falsely denied under oath that he had not talked to the prosecution in preparation for his testimony. 9R 2314. The prosecution did not correct that testimony (which it knew to be false), but instead vouched for Cook's honesty to the jury, telling the jury that Cook's testimony was completely truthful. 10R 2450. In addition, the prosecutors suppressed a 74-page transcript of Cook's pretrial coaching session with the prosecutors, Pet. App. A at 10, after having assured the trial court and defense counsel that they would voluntarily turn over all discoverable material. *Id.* at 4.

Reversing the district court, the Fifth Circuit ruled that Farr's perjured testimony was immaterial because, even if it had been exposed, there was not a reasonable probability that

any of the jurors would have changed his or her vote for the death penalty. *Id.* at 33.

2. Defense Counsel's Ineffectiveness At The Penalty Phase

Defense counsel Lynn Cooksey did basically nothing to prepare for the penalty phase of the trial. When the guilty verdict came in at around 11 p.m., Cooksey *then* instructed petitioner's mother to identify and arrange for the appearance of witnesses to testify in mitigation when the penalty phase began the next morning. Fed. Ev. Hr'g Tr. at 225. The cursory testimony of the witnesses who appeared at her request shows that Cooksey had done nothing to prepare them, as several of those witnesses confirmed. *Id.* at 216-17, 227, 232-33. Indeed, Cooksey had never before met or spoken to any of them. At one point Cooksey interrupted the penalty phase proceedings for a chambers conference, during which he pointed to a list of possible witnesses and asked petitioner which ones should be called, saying:

> I don't know these people, I don't know any of those people, I don't know how well they know you and how long they have known you. You know that. You know them a lot better than I do. Who on this list do you want me to call? 10R 2536.

Based on Cooksey's failure to prepare those witnesses, as well as his failure to prepare petitioner's parents for their testimony, the Fifth Circuit ruled that Cooksey rendered ineffective assistance of counsel at the penalty phase. Pet. App. A at 39. The court held that Cooksey was also ineffective in failing to interview Vetrano Jefferson, the other of the State's two penalty phase witnesses, *id.* at 41, and in failing to obtain petitioner's "social history and to investigate mitigating psychological evidence." *Id.* at 36.

Notwithstanding Cooksey's trifold ineffectiveness, however, the Fifth Circuit held that his failings were immaterial and reversed the district court's ruling that petitioner had been deprived of his constitutional right to counsel. *Id.* at 39, 41, 42-44

ARGUMENT

We show in Part I below that the prosecution's use of perjured testimony in this case was prejudicial and thus denied petitioner Due Process. In Part II we show that defense counsel's ineffective performance during the penalty phase also was prejudicial, thereby depriving petitioner of his Sixth Amendment right to effective assistance. For either or both of these reasons, petitioner's death sentence should be set aside.

I.

THE PROSECUTION'S USE OF PERJURED TESTIMONY VIOLATED DUE PROCESS

1. Nearly 70 years ago this Court ruled that the prosecutor is the representative of a sovereignty whose interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).[3/] Speaking more particularly that same year in *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (per curiam), the Court held that "the presentation of testimony known to be perjured" is "inconsistent with the rudimentary

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[3/] The sovereignty in *Berger* was the United States, but the concept is apt and the quote has been used in cases involving state prosecutors as well. *E.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995); *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999).

demands of justice" and thus violates Due Process, a term said to embody "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 112.

Over the years the Court has built on and repeatedly cited those decisions as authoritative. Thus, in *Pyle* v. *Kansas*, 317 U.S. 213 (1942), the Court held that allegations that a prosecutor used perjured testimony and suppressed evidence stated a Due Process violation. Fifteen years later, applying "the general principles laid down by this Court in" *Mooney* and *Pyle*, the Court granted a habeas petition to a state prisoner whose conviction was gained through the use of "seriously prejudicial" perjured testimony. *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957).

Alcorta recognized that a prosecutor must correct testimony that he knows is perjured as well as refrain from soliciting false testimony. That principle was reaffirmed in *Napue* v. *Illinois*, 360 U.S. 264 (1959), where a prosecution witness testified falsely that "he had received no promise of consideration in return for his testimony" and the prosecutor "did nothing to correct the witness' false testimony." *Id.* at 265. The Court concluded that a conviction "must fall under the Fourteenth Amendment * * * when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.[4/]

Mooney, *Pyle*, and *Napue* were followed by and formed the basis of the Court's holding in *Giglio* v. *United States*, 405 U.S. 150, 154–55 (1972), that the prosecution's

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[4/] See also *California* v. *Trombetta*, 467 U.S. 479, 485 (1984) (prosecutor has a "constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath").

chief witness's uncorrected false testimony that he had received no promises for prosecutorial leniency in exchange for his testimony violated Due Process and required a new trial.[5/]

2. Here, as recounted above, the prosecution did nothing to correct testimony from witness Farr that the prosecution knew was false – namely, Farr's testimony at the guilt/innocence stage that he was not a paid informant and had not spoken to the police about the case before his testimony, and his testimony at the penalty phase that he had had no contact with Deputy Huff and was not cooperating with the prosecution. See *supra*, at 2. On the contrary, the State sponsored that testimony, albeit after the fact, by affirmatively assuring the jury of its truthfulness both at the

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[5/] The fundamental rules established by and reflected in this string of decisions from the Court are largely mirrored by both Texas law and applicable ethics rules. A prosecutor in Texas "is more than a mere advocate, but a fiduciary to fundamental principles of fairness." *Duggan* v. *State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). See also Tex. Code Crim. Proc. Ann. art. 2.01 (2002) ("It shall be the primary duty of all prosecuting attorneys * * * not to convict, but to see that justice is done."); Tex. Disciplinary Rules Prof'l Conduct R. 3.09 cmt. 1 (2003) ("A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate.").

Similarly, under the Model Rules of Professional Conduct R. 3.8 cmt. (2002), prosecutors are "minister[s] of justice" who must seek convictions only "upon the basis of sufficient evidence." See also ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 3-1.2 cmt. (3d ed. 1993) ("[T]he prosecutor's obligation is to protect the innocent as well as to convict the guilty."); *id.* § 3-5.6(a) ("[a] prosecutor should not knowingly offer false evidence").

guilt/innocence phase, where it commended Farr for his candidness and said that "[w]e didn't hide anything with regard to" Farr's testimony, and again at the penalty phase, when it told the jury that Farr had "been open and honest with you in every way." 10R 2449, 2453, 2579.

3. That deceitful conduct by the prosecution was material and warrants reversal of petitioner's death sentence. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court ruled that, where the prosecution's case includes the knowing use of perjured testimony, *Mooney* and "a series of subsequent cases" had established that reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103.

The Court refined its materiality analysis in *United States* v. *Bagley*, 473 U.S. 667, 676 (1985), where it held that non-disclosed evidence favorable to the accused *other* than perjured testimony is material "only if there is a reasonable probability that * * * the result of the proceeding would have been different" had the evidence been disclosed. *Id.* at 682 (Opinion of Blackmun and O'Connor, JJ.) and 685 (Opinion of White, J., Burger, C.J., and Rehnquist, J.). The *Agurs* standard for the knowing use of false testimony, however, remained unchanged.

The *Agurs* test – whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury – is satisfied here. The prosecution called only two witnesses at the penalty phase, Farr and Vetrano Jefferson. Jefferson was petitioner's common law brother-in-law. He testified that he and petitioner recently had a fight during which petitioner hit him with a gun and threatened to kill him. 10R 2493-94. But petitioner apparently had no prior record (the State offered none in aggravation) and nothing about the homicide in this case marked it one appropriate for the death penalty under Texas

law – namely, one falling into that "small group of narrowly defined and particularly brutal offenses."[6/] In these circumstances it is highly doubtful that Jefferson's testimony about one incident between near family members would have persuaded the jury to return a death sentence (and whether such a sentence on that evidence alone could withstand appellate review).[7/]

Any doubt on this score may be resolved in petitioner's favor by considering the prosecution's view of Farr's testimony at the penalty phase. It told the jury in closing argument that Farr's testimony was "of the utmost significance" to their case for the death penalty because it showed that Banks posed a "danger to friends and strangers, alike." Pet. App. C at 44; 10R 2593. Indeed, even the Fifth Circuit in its decision below acknowledged that Farr's testimony "*was crucial to the State's position on future dangerousness*." Pet. App. A at 32 (emphasis added).

The Fifth Circuit's holding that Farr's perjured testimony was not material is impossible to square with its statement that the testimony was "crucial to the State's position." The holding rested in part on the testimony of a retired Arkansas law enforcement officer that he had used Farr "once or twice" as a paid informant. *Id.* at 28. The Fifth

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[6/] *Jurek* v. *Texas*, 428 U.S. 262, 270 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted). See also *id.* at 279 (Texas law permits the death penalty only in "a narrowly defined group of the most brutal crimes") (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

[7/] See, *e.g.*, *Ellason* v. *State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991) (fight between in-laws "not particularly probative" of whether defendant would commit future acts of violence constituting continuing threat to society).

Circuit ruled that that testimony already impeached Farr, and that evidence that he had lied about being a paid informant in this case would not have materially further discredited him. *Id.* at 32-33. But there is a big difference between the introduction of conflicting testimony from a witness who himself was subject to impeachment[8/] and who could only testify about what had supposedly happened "once or twice" in Arkansas, and an indisputable demonstration that Farr had repeatedly lied under oath about his informant status and cooperation with the police and prosecution *in this very case*.[9/]

The same is true for Farr's now discredited testimony that he and petitioner went to Dallas to get a gun so that petitioner – rather than Farr himself, as petitioner testified – could engage in robberies. Evidence of Farr's perjury and his coziness with the prosecution could have made a profound difference in the jury's view – or in the view of one juror – regarding petitioner's future dangerousness.

The Fifth Circuit also held that petitioner had failed to exhaust his claims regarding Farr and had thus defaulted them under *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992), and that petitioner had not adequately alleged perjury in his federal petition and hence was not entitled to the *Agurs* "reasonable likelihood" standard. Pet. App. A at 19-20, 22, 31-33. Apart

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[8/] On cross-examination by the State, Owen admitted that he was about to go into business with the investigator employed by petitioner's defense counsel. 10R 2560.

[9/] See *Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

from noting that the Fifth Circuit's result rewards prosecutors who deliberately violated their constitutional obligations of disclosure, we leave it to petitioner to explain why, under *Strickler* v. *Greene*, 527 U.S. 263 (1999), argued to but not mentioned by the Fifth Circuit, the State's conduct of concealment (including its purported open file policy) excused petitioner from not raising his Farr claims earlier.

As for the appropriate standard, we believe *Agurs* does apply in this case because the issue of Farr's false testimony was tried with the consent of the parties in the federal court hearing below and was briefed in the post-hearing briefs. Pet App. A at 9-10, 16. Indeed, the district court ruled that at "no time did the State correct Farr's erroneous testimony or announce Farr's paid informant status." *Id.* at 30. But petitioner should prevail even if his claim were to be construed solely as a claim of non-disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963), rather than a claim of knowing use of perjured testimony under the line of cases from *Mooney* to *Giglio* discussed above, with the result that the *Bagley* "reasonable probability of a different result" standard applies rather than *Agur*'s "reasonable likelihood" standard. As we have seen, the testimony from the only other witness at the penalty phase was "not particularly probative" about petitioner's future dangerousness. *Ellason* v. *State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991). Nor do the facts of the crime bring this case within the "small group of narrowly defined and particularly brutal offenses" for which Texas law reserves the death penalty. See pp. 8-9 n.6, *supra*. Thus Farr's testimony "was crucial to the State's position on future dangerousness" Pet. App. A at 32.[10/] We may take the

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[10/] *See Giglio*, 405 U.S. at 154 (reversing for the nondisclosure of an understanding regarding future prosecution of a government witness where "the Government's case depended almost entirely on" that witness' testimony).

prosecution's word for it that his testimony was "of the utmost significance" to the State's case for death. 10R 2593.

Accordingly, had the jury known that Farr was a paid informant cooperating with the prosecution in this case, and had lied about his status under oath, there is a "reasonable probability" that at least one juror would have voted for a different result, as the district court (applying the *Bagley* standard) ruled. Put differently, the disclosure of Farr's perjury "could reasonably be taken to put the whole [penalty phase of the] case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995). Thus petitioner's death sentence should be set aside.

II.

COOKSEY'S INEFFECTIVENESS DURING THE PENALTY PHASE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court established a two-part test to determine when counsel performance violates the Sixth Amendment: first, whether "counsel's representation fell below an objective standard of reasonableness," and second, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. The ultimate question remains "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

In capital cases, courts address these questions with respect to counsel performance at both the guilt phase and at sentencing. See *id.* at 686–87. "[C]ounsel has a duty to make reasonable investigations" into potential mitigation evidence,

"or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. That is because "[t]he sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Romano* v. *Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001).[11/]

So far as the record shows, petitioner's counsel did almost nothing to prepare for the penalty phase in this case, and undertook no investigation whatever into mitigating evidence.

There is no dispute that Cooksey's performance was ineffective in multiple respects. First, as the Fifth Circuit held, he failed to prepare penalty phase witnesses. Pet App. A at 39. As noted above, Cooksey left it to petitioner's mother, with instructions given to her at eleven p.m. when the jury returned its verdict of guilt, to round up character witnesses to testify on petitioner's behalf the next morning. His requested chambers conference with the judge the next day, interrupting his own case, demonstrates that he had made no effort to meet any of his potential witnesses, much less to learn from them how and to prepare them so they might be most helpful to petitioner's case.

The Fifth Circuit also held that Cooksey was ineffective in failing to interview Vetrano Jefferson, the other of the State's two penalty phase witnesses. *Id.* at 41. Had

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11/ See also Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 299, 303 (1983) (the penalty phase "is a trial *for* life in the sense that the defendant's life is at stake, and it is a trial *about* life, because a central issue is the meaning and value of the defendant's life.")

Cooksey done so, he would have learned – and the jury would have learned – that Jefferson while drunk provoked the fight with petitioner by threatening petitioner's sister and then, when petitioner came to her aid, threatened petitioner as well. *Id.* at 13. Instead, Jefferson's testimony left the jury with the false impression that petitioner was the unprovoked, violent aggressor and allowed the prosecution to contend that petitioner was a future danger "to friends and strangers, alike." Pet. App. C at 44; 10R 2593.

Finally, the Fifth Circuit held that Cooksey was further ineffective in that he failed to obtain petitioner's "social history and to investigate mitigating psychological evidence." Pet. App. A at 36. Thus he failed to put on evidence of petitioner's disfiguring allergies, that he was "beaten and terrorized by his alcoholic father," that he had suffered brain damage, and that his psychological profile "predicted that he would prove a 'safe,' nonviolent inmate during his prison incarceration." *Id.* at 37.[12/]

This record shows a complete breakdown of the defense function at the penalty phase of the case. *Amici* have seen their share of bumbling defense counsel, as the Court may imagine. But there can be no conceivable justification for Cooksey's failure to interview Jefferson, or to investigate petitioner's social history and psychological condition.[13/]

[12/] The quotations are from the report of psychologist Dr. Pina, introduced in petitioner's state habeas proceeding. The report by Dr. Cunningham, which the Fifth Circuit ruled was not exhausted, presented even stronger mitigating evidence. Pet. App. A at 37.

[13/] A reasonable decision not to investigate requires a "reasoned strategic judgment" not to look into potential avenues for mitigation. *Wiggins* v. *Smith*, 539 U.S. __, No. 02-311, 2003 U.S. LEXIS 5014, at *29 (June 26, 2003).

And very little in *amici's* collective experience compares to the spectacle of defense counsel in a capital case, having done nothing to inform himself, turning to his young client in the middle of the penalty phase for advice on what witnesses to call.

In our view the Fifth Circuit's holding that Cooksey's dismal performance was not prejudicial cannot possibly be correct. Petitioner had no prior record and nothing about the crime singled it out as particularly brutal. Had Jefferson's testimony about who was the aggressor been revealed as false; had the jury known of petitioner's physical afflictions, the abusive treatment he suffered at the hands of his alcoholic father, and a psychological evaluation that he had suffered brain damage but nonetheless was predicted to be a nonviolent inmate; and had his mother and father, as well as his other character witnesses, been even minimally prepared to describe petitioner's history and character so as to portray him sympathetically, it is simply impossible to conclude that there is not a reasonable probability that at least one juror would have voted against the death penalty.[14/]

This Court's recent decision in *Wiggins* is instructive. Wiggins' counsel's unjustified failure to investigate led him to overlook significant evidence of Wiggins' extraordinarily difficult childhood, and the Court had no difficulty in concluding that, if the jury had learned more about Wiggins' background, "there is a reasonable probability that at least one juror would have struck a different balance" and voted against death. 2003 U.S. LEXIS 5014, at *49.

[14/] The same conclusion holds true even if we exclude Cooksey's failure to interview Jefferson, a claim the Fifth Circuit held was unexhausted as well as immaterial. Pet. App. A at 42.

Wiggins relied heavily on *Williams* v. *Taylor*, 529 U.S. 362 (2000), which also held that counsel's assistance at the penalty phase was constitutionally deficient because he did not adequately search for mitigation evidence. Despite substantial evidence of dangerousness arrayed against Williams, including his extensive record of extremely violent conduct, the Court nonetheless ruled that, had his counsel presented the available mitigation evidence to the jury, it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.[15/]

Here, as in *Wiggins* and *Williams*, petitioner had "the kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 2003 U.S. LEXIS 5014, at *45 (citing *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)). And here, like *Wiggins*, the comparison to *Williams* is highly favorable, for "the State's evidence in

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15/ Many courts of appeals have reached similar results where counsel failed to prepare for penalty phase proceedings. *E.g.*, *Brownlee* v. *Haley*, 306 F.3d 1043, 1068 (11th Cir. 2002) (counsel "failed to investigate or present any evidence of mitigating circumstances to the jury," including "serious psychiatric problems and substantial intellectual limitations"); *Simmons* v. *Luebbers*, 299 F.3d 929, 936–39 (8th Cir. 2002) (counsel failed to introduce evidence of defendant's troubled background); *Marshall* v. *Hendricks*, 307 F.3d 36, 102 (3d Cir. 2002) (counsel "did no preparation or investigation whatsoever for the penalty phase"); *Carter* v. *Bell*, 218 F.3d 581, 594–600 (6th Cir. 2000) (counsel conducted "no investigation to prepare a defense" and failed to find facts regarding defendant's horribly abusive childhood and possible mental illness); *Lockett* v. *Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) (counsel failed to "conduct a minimal investigation of Lockett's possible mitigation evidence," and his performance was therefore, "under *Strickland*, deficient"); *Patrasso* v. *Nelson*, 121 F.3d 297, 304 (7th Cir. 1997) (counsel "made no effort to * * * seek out mitigating factors").

support of the death penalty [is] far weaker than in *Williams*, where [the Court] found prejudice as the result of counsel's failure to investigate and present mitigating evidence." 2003 U.S. LEXIS 5014, at *50. And here, as in *Wiggins*, nothing in petitioner's history contained "the double edge [the Court has] found to justify limited investigations in other cases." 2003 U.S. LEXIS 5014, at *46 (citing *Burger* v. *Kemp*, 483 U.S. 776 (1987), where a psychological report commissioned by defense counsel was potentially devastating to the defendant, and *Darden* v. *Wainwright*, 477 U.S. 168 (1986), where the defendant had been in and out of prison for much of his adult life).

Strickland teaches that, in a Sixth Amendment right to counsel case, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Our collective experience teaches us that the penalty phase proceeding in this case was fundamentally unfair. Cooksey failed petitioner completely through an appalling want of dedication and energy. With his life in the balance, petitioner might as well have been unrepresented for all the effort Cooksey made. On top of that, the prosecution built its case for death on testimony it knew to be perjured. The Fifth Circuit should not have countenanced the fundamental unfairness of this proceeding, and its decision upholding the imposition of the death penalty should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectively submitted,

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